



**Billing Code 7709-02-P**

**PENSION BENEFIT GUARANTY CORPORATION**

**Approval of Special Withdrawal Liability Rules: the United Food and Commercial Workers International Union – Industry Pension Fund**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of Approval.

**SUMMARY:** The Pension Benefit Guaranty Corporation (PBGC) received a request from the United Food and Commercial Workers International Union – Industry Pension Fund for approval of a plan amendment providing for special withdrawal liability rules. PBGC published a Notice of Pendency of the Request for Approval of the amendment. PBGC is now advising the public that the agency has approved the requested amendment.

**FOR FURTHER INFORMATION CONTACT:** Bruce Perlin (*Perlin.Bruce@PBGC.gov*), 202-326-4020, ext. 6818 or Elizabeth Coleman (*Coleman.Elizabeth@PBGC.gov*), ext. 3661, Office of the General Counsel, Suite 340, 1200 K Street N.W, Washington, DC 20005-4026; (TTY users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4020.)

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4203(a) of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (ERISA), provides that a complete withdrawal from a multiemployer plan generally occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. Under section 4205 of ERISA, a partial withdrawal generally occurs when an employer: (1) Reduces its contribution base units by seventy percent in each of three consecutive

years; or (2) permanently ceases to have an obligation under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan, while continuing to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location or to an entity or entities owned or controlled by the employer; or (3) permanently ceases to have an obligation to contribute under the plan for work performed at one or more but fewer than all of its facilities, while continuing to perform work at the facility of the type for which the obligation to contribute ceased.

Although the general rules on complete and partial withdrawal identify events that normally result in a diminution of the plan's contribution base, Congress recognized that, in certain industries and under certain circumstances, a complete or partial cessation of the obligation to contribute normally does not weaken the plan's contribution base. For that reason, Congress established special withdrawal rules for the construction and entertainment industries.

For construction industry plans and employers, section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan and the employer either continues to perform previously covered work in the jurisdiction of the collective bargaining agreement or resumes such work within 5 years without renewing the obligation to contribute at the time of resumption. In the case of a plan terminated by mass withdrawal (within the meaning of section 4041(A)(2) of ERISA), section 4203(b)(3) provides that the 5-year restriction on an employer's resuming covered work is reduced to 3 years. Section 4203(c)(1) of ERISA applies the same special definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement. In contrast, the general

definition of complete withdrawal in section 4203(a) of ERISA includes the permanent cessation of the obligation to contribute regardless of the continued activities of the withdrawn employer.

Congress also established special partial withdrawal liability rules for the construction and entertainment industries. Under section 4208(d)(1) of ERISA, “[a]n employer to whom section 4203(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer’s obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.” Under section 4208(d)(2) of ERISA, “[a]n employer to whom section 4203(c) (relating to the entertainment industry) applies shall have no liability for a partial withdrawal except under the conditions and to the extent prescribed by [PBGC] by regulation.”

Section 4203(f)(1) of ERISA provides that PBGC may prescribe regulations under which plans in other industries may be amended to provide for special withdrawal liability rules similar to the rules prescribed in section 4203(b) and (c) of ERISA. Section 4203(f)(2) of ERISA provides that such regulations shall permit the use of special withdrawal liability rules only in industries (or portions thereof) in which PBGC determines that the characteristics that would make use of such rules appropriate are clearly shown, and that the use of such rules will not pose a significant risk to the insurance system under title IV of ERISA. Section 4208(e)(3) of ERISA provides that PBGC shall prescribe by regulation a procedure by which plans may be amended to adopt special partial withdrawal liability rules upon a finding by PBGC that the adoption of such rules is consistent with the purposes of title IV of ERISA.

PBGC’s regulations on Extension of Special Withdrawal Liability Rules (29 CFR part 4203) prescribe procedures for a multiemployer plan to ask PBGC to approve a plan amendment

that establishes special complete or partial withdrawal liability rules. The regulation may be accessed on PBGC's Web site (<http://www.pbgc.gov>). Section 4203.5(b) of the regulation requires PBGC to publish a notice of the pendency of a request for approval of special withdrawal liability rules in the *Federal Register*, and to provide interested parties with an opportunity to comment on the request.

### **The Request**

PBGC received a request from the United Food and Commercial Workers International Union – Industry Pension Fund (the “Plan”) for approval of a plan amendment providing for special withdrawal liability rules. The Plan provided supplemental information in response to a request from PBGC. PBGC published a Notice of Pendency of the Request for Approval of the amendment October 9, 2018. PBGC's summary of the actuarial reports provided by the Plan may be accessed on PBGC's web site (<http://www.pbgc.gov/prac/pg/other/guidance/multiemployer-notice.html>). PBGC did not receive any comments from interested parties.

In summary, the Plan is a multiemployer pension plan jointly maintained by Local Unions affiliated with the United Food and Commercial Workers International Union (“UFCW”) and employers signatory to collective bargaining agreements with the UFCW. The Plan covers unionized employees who work predominantly in the retail food industry. The Plan's proposed amendment would be effective for withdrawals occurring under ERISA section 4205(a)(1) during the three-year testing period ending June 30, 2014, or any subsequent plan year and for any withdrawals occurring under sections 4203 and 4205(a)(2) of ERISA on or after July 1, 2013. Thus, the proposed amendment is intended to apply to cessations of the obligation to contribute that have already occurred. Plans may adopt this retroactive relief as a discretionary

provision under section 4203.3(b)(2) of ERISA. There are two employers that may be eligible for relief from withdrawal liability under the proposed amendment if it is approved.

The proposed amendment would create special withdrawal liability rules for employers contributing to the Plan for work performed under a contract or subcontract for services to federal government agencies (“Employer”). The Plan’s submission represents that the industry for which the rule is requested has characteristics similar to those of the construction industry. According to the Plan, the principal similarity is that when an Employer loses a government contract, or subcontract, it usually does so through the competitive bidding process, and the applicable federal government agency typically contracts with a successor Employer that is obligated to contribute to the Plan at the same or substantially the same rate for the same employees. The Plan believes the proposed amendment may induce potential new employers to bid on work at a government facility and agree to continue making contributions to the Plan when they otherwise may avoid seeking a contribution obligation to the Plan to avoid potential withdrawal liability.

Under the proposed amendment, the special withdrawal liability rules would apply to an Employer that ceases to have a contribution obligation to the Plan because it loses a governmental contract to a successor Employer (“Successor Employer”), if all the following conditions are met for the 5 plan years immediately following the year the Employer lost the contract.

A complete withdrawal will *not* occur if an Employer loses all its governmental contracts to a Successor Employer, so long as: (1) substantially all the employees for which the Employer was obligated to contribute to the Plan continue to perform covered work with a Successor Employer; (2) for each of the next 5 plan years the Successor Employer has an obligation to

contribute at the same or a higher contribution rate to the Plan; (3) for each of the next 5 plan years the Successor Employer contributes substantially the same contribution base units as did the initial Employer in the plan year immediately before the year it lost the contract; and (4) the Employer posts a bond or establishes an escrow account equal to the lesser of the present value of its withdrawal liability or 5 years of installment payments of its withdrawal liability. The Employer *will* have experienced a complete withdrawal if within the 5 plan years following the year the Employer lost the contract, the Successor Employer's contract terminates, and no subsequent Successor Employer assumes the contribution obligations and conditions, or if the Successor Employer fails to meet the contribution conditions.

A partial withdrawal will *not* occur if an Employer loses one or more, but less than all, of its governmental contracts to a Successor Employer, or if it loses all its governmental contracts but continues to have a contribution obligation to the Plan under a collective bargaining agreement, so long as: (1) for each of the next 5 plan years the Successor Employer has an obligation to contribute at the same or a higher contribution rate to the Plan; (2) for each of the next 5 plan years the Successor Employer contributes substantially the same contribution base units as did the initial Employer in the plan year immediately before the year it lost the contract; and (3) the Employer posts a bond or establishes an escrow account equal to the lesser of the present value of its partial withdrawal liability or 5 years of installment payments of its withdrawal liability. The Employer *will* have experienced a partial withdrawal if within the 5 plan years following the year the Employer lost the contract, the Successor Employer's contract terminates, and no subsequent Successor Employer assumes the contribution obligations and conditions, or if the Successor Employer fails to meet the contribution conditions.

Alternatively, the proposed amendment provides that an Employer that loses a governmental contract to a Successor Employer will not experience a complete or partial withdrawal if the Successor Employer assumes the Employer's contribution history under the affected contract(s) for the plan year in which the contract is lost and the 5 immediately preceding plan years. Lastly, the Plan's trustees may waive or reduce the bond or escrow requirement if the Employer demonstrates that doing so would not significantly increase the risk of financial loss to the Plan. The Plan's request includes the actuarial data on which the Plan relies to support its contention that the amendment will not pose a significant risk to the insurance system under Title IV of ERISA.

### **Decision on the Proposed Amendment**

The statute and the implementing regulation state that PBGC must make two factual determinations before it approves a request for an amendment that adopts a special withdrawal liability rule. ERISA section 4203(f); 29 CFR § 4203.5(a). First, based on a showing by the plan, PBGC must determine that the amendment will apply to an industry that has characteristics that would make use of the special rules appropriate. Second, PBGC must determine that the plan amendment will not pose a significant risk to the insurance system. PBGC's discussions on each of those issues follows. After review of the record submitted by the Plan, and having received no public comments, PBGC has made the following determinations.

1. *What is the Nature of the Industry?*

In determining whether an industry has the characteristics that would make adoption of special withdrawal liability rules appropriate, an important consideration is the extent to which the Plan's contribution base resembles that found in the construction industry. This threshold question requires consideration of the effect of Employer withdrawals on the Plan's contribution base. The Plan asserts that historically when governmental contracts have changed hands, the Plan has not experienced reduced contributions. Similar to construction industry employers, most Employers that have ceased to contribute have been replaced by a Successor Employer that begins contributing for the same work. Therefore, we conclude the proposed amendment will apply only to an industry that has characteristics that would make use of the special withdrawal rules appropriate.

2. *What is the Exposure and Risk of Loss to PBGC?*

*Exposure.* The Plan is in a strong funded position. The Plan is a Green zone plan with steady contributions and a solid base of active participants and as of July 1, 2016, was 104.5% funded.

*Risk of Loss.* The record shows that the proposed amendment presents a low risk of loss to PBGC's multiemployer insurance program. The industry covered by the amendment has unique characteristics that indicate the contribution base is likely to remain stable because the withdrawal of an Employer typically does not have an adverse effect on the plan's contribution base. In addition, the Employers constitute a very small part of the total number of employers obligated to contribute to the Plan, accounting for only 640 of the Plan's over 87,593 active participants (0.73% of the Plan's total active participants). Accordingly, the data substantiates the Plan's assertion that the Employers' contribution base is secure and the amendment will not pose a significant risk to the insurance system.



## **Conclusion**

Based on the Plan's submissions and the representations and statements made in connection with the request for approval, PBGC has determined that the plan amendment adopting the special withdrawal liability rules: (1) will apply only to an industry that has characteristics that would make the use of the special rule appropriate; and (2) will not pose a significant risk to the insurance system. Therefore, PBGC hereby grants the Plan's request for approval of a plan amendment providing special withdrawal liability rules, as set forth herein. Should the Plan wish to amend these rules at any time, PBGC's approval of the amendment will be required.

Issued in Washington, DC by,

**William Reeder,**  
*Director,*  
*Pension Benefit Guaranty Corporation.*

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